No. 491

October Term, 1916

IN THE

Supreme Court of the United States

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO,

Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO,

Defendant in Error.

File No. 25,312

Brief of Plaintiff in Error on Motion to Dismiss or Affirm

FERDINAND JELKE, Jr.,
LANDON L. FORCHHEIMER,
Attorneys for Plaintiff in Error.

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In his statement of facts, and in his statement of the case, counsel for defendant in error indulges in some inaccuracies in his endeavor to sustain the motion on the ground of the frivolity of the federal questions raised by the writ. Counsel presents a case to the court entirely different from the case presented to the court by the record. Thus counsel states that the claim of plaintiff merely was "That defendant bank had assumed to act as its agent, to in good faith loan money on collateral; that defendant bank instead of acting as agent in good faith loaned money of plaintiff on collateral which defendant knew to be worthless and which plaintiff had every reason to believe was adequate."

Be that as it may, the case was pleaded on the theory that plaintiff in error would be responsible for state-

ments required to be published by the National Bank Act if they were false in fact, and if defendant in error did, and had a right to rely, on such statements provided plaintiff in error intended defendant in error to rely on said statements and if plaintiff in error had conspired to defraud defendant in error by lending money to a known insolvent on collateral known to be worthless. The case was submitted to the jury (R. 148, 150) on the theory set up in plaintiff's brief and on the fraudulent misrepresentation theory; and on the latter hypothesis the statements were made a basis of liability if false in fact or if made recklessly and without regard to whether they were in fact true or false. In justice to our clients therefore, it is necessary to make a more complete and accurate statement of the case and of the facts appearing of record herein.

STATEMENT OF THE CASE.

Adopting for the time being defendant in error's terminology, the plaintiff's petition, filed June 7, 1913, alleges that the plaintiff and defendant are both national banks, the plaintiff doing business at Okeana, Ohio, and the defendant at Cincinnati, Ohio; that the plaintiff opened an account with the defendant and that defendant agreed in consideration of said deposit to lend surplus funds belonging to plaintiff on call loans secured by adequate collateral; that the plaintiff had about $5,000.00 deposited with defendant on December 9, 1911, payment of which it had demanded on the 22nd of July, 1912, which said repayment defendant refused to make. The petition concludes with a prayer for judgment for $5,000.00 with interest from the 9th of December, 1911, and for an accounting.

A general demurrer to this petition was overruled. The allegations of defendant's answ material so far as this motion is concerned, are that defendant had loaned said sum of $5,000.00 with the knowledge and approval of the plaintiff, and that the plaintiff had in all respects fully ratified, affirmed and approved the loans made by the defendant. The reply as amended (the case was tried on the petition, the answer, and the amended reply) admitted that the loans had been made, but alleged that plaintiff and one E. E. Galbreath, defendant's president, had conspired to defraud plaintiff of $5,000.00 and that in pursuance of said conspiracy the plaintiff had loaned the sum of $5,000.00 to said Galbreath, knowing said Galbreath to be insolvent, and had taken as collateral security for said loans stock which defendant knew to be worthless. The reply further alleged:

> "that on or about the 11th day of January 1911 and thereafter during said year 1911, the defendant published to the world and delivered to the plaintiff sworn statements of its financial condition, from which it appeared that the said defendant's stock was worth more than Two Hundred Dollars ($200.00) per share in value, and upon such statement it was intended by the defendant that the plaintiff should, and upon which the plaintiff did rely in its dealings with the defendant, but which statement was false and was known by the defendant to be, and its stock was then worthless and was known by the defendant to be, and that at the time of the making of the said loans, as aforesaid, to the said E. E. Galbreath, and the appropriation of the said moneys from the plaintiff's deposit accounts, as aforesaid, and the taking of the said stock as security, the defendant's bank shares were valueless," (R. 11, 12.)

to defendant's damages in the sum of $5,000.00. No other pleading was filed by defendant because under section 11329, General Code of Ohio, "new matter alleged in a reply is deemed controverted by the adverse party as upon a denial or avoidance as the case may require." (This statute and all others referred to in this brief are printed in the appendix hereto.)

The issues of fact made by the pleadings were, thus, whether the defendant and said Galbreath had conspired to defraud the plaintiff of $5,000.00; and whether the defendant had induced plaintiff to make the loans complained of by fraudulent misrepresentations of fact.

THE FACTS.

It is shown by the record that early in January, 1911, plaintiff's cashier arranged with defendant's president, E. E. Galbreath, to open a deposit account on which the defendant was to pay 2½ per cent. on the average daily balance and against which the defendant was, at the request of plaintiff, to charge secured call loans, as well as checks, etc.; that immediately after the opening of this account the defendant was made the plaintiff's reserve agent (Exhibit 5, R. 155). From time to time the defendant charged secured call loans to plaintiff's account pursuant to instructions received from plaintiff. On December 9, 1911, defendant, pursuant to plaintiff's instructions, loaned $2,500.00 of the money deposited with it to said E. E. Galbreath, its president, known by defendant to be its president, said loan being secured by eleven shares of defendant's capital stock belonging to Galbreath, and charged the loan to plaintiff's account; and on January 5, 1912, a similar loan of $2,500.00 secured by twelve shares of defendant's capital

stock was made to I. Doyle, for Galbreath's accommodation, by charging this loan to plaintiff's account, Doyle having no real interest in the transaction. The stock securing this note belonged to Galbreath.

The defendant did not then and has not since received one penny of this money (R. 88).

Previous to these loans T. P. Kane, the Deputy and Acting Comptroller of the Currency, critized the condition of the Second National Bank in the language contained in plaintiff's brief. Mr. Kane's letter further specified certain assets aggregating $1,543,846.97 which he considered very unsatisfactory for one reason or another. He ordered the defendant to take immediate measures to remove the same from its assets. Four hundred and eighty-seven thousand one hundred and ninety-five dollars and eighty-nine cents ($487.195.89) was paid on, or charged off, of these assets prior to December 9, 1911; five hundred and ten thousand six hundred and forty-five dollars and eighty-nine cents ($510,645.89) was paid or charged off prior to January 5, 1912, and eight hundred and thirty-five thousand eight hundred and thirteen dollars and thirty-three cents ($835,813.33) had been collected at the time of the trial. (Exhibit 49, R. 186, 187.) Between March 4, 1911, and January 5, 1912, the Second National Bank published four statements in the Cincinnati Enquirer as required by Section 5211, R. S. U. S. These statements were an exact copy of the books of the Second National Bank, assets criticised by Mr. Kane and not removed prior to the publication of these statements appearing as assets of the Second National Bank therein. These statements all showed that the Second National Bank had a capital stock of $1,000,000.00, a surplus of $1,000,000.00, and undivided profits of between

$106,874.31 and $211,268.65, the amount of the undivided profits being different in each report. Plaintiff's cashier saw and read these statements, and, relying upon their truth, approved the loans to Galbreath and Doyle complained of in the petition (R. 35) as soon as he was notified thereof.

The statement in plaintiff's brief that the defendant was insolvent must be due to a misapprehension of counsel.

The fact is that on April 14, 1912, everyone who had theretofore been an officer or director of the Second National Bank resigned as such officer or director or both. The officers and members of the Clearing House of the City of Cincinnati were thereupon appointed directors and officers in their places, and the Clearing House guaranteed the deposits, issuing a public statement to that effect, notifying the world that the defendant was solvent but that its capital stock was impaired R. 84). On April 18, 1912, the Second National Bank received a notice from the Comptroller of the Currency dated April 15, 1912, that its capital stock had been impaired 100 per cent. and, that unless its stockholders levied an assessment of 100 per cent. upon their stock, that a receiver would be appointed to close up the business of the defendant according to the provisions of Section 5234, R. S. U. S. (R. 72).

This action of the Comptroller of the Currency was published in the Cincinnati newspapers on April 15, 1912, appearing as a special dispatch from Washington (R. 85). With knowledge of these facts Mr. Earnshaw, plaintiff's cashier, on that day came to Cincinnati and took the notes with the collateral securing the same back to Okeana. Although told then that the Doyle loan had

been made for the accommodation of Mr. Galbreath, with this knowledge he thereafter signed four statements acknowledging that the defendant's statement of account to the plaintiff which he represented was correct. (Exhibits "E" to "H" inclusive, R. 189, 190.)

The defendant's stockholders met on July 6, 1912, and resolved to levy an assessment of 100 per cent. on the capital stock, payable on July 18, 1912 (R. 85). The assessment so levied on the stock held as collateral to the two loans was not paid on the date set. The stock was therefore sold on August 22, 1912, at public sale pursuant to the provisions of the Revised Statutes of the United States at a premium of $167.88, with the stock of other stockholders who had failed to pay the assessment (R. 86, 87). This sum is held by the Second National Bank as a special fund awaiting its owner (R. 82).

At the close of all the evidence and pursuant to the provisions of Section 11447, Ohio General Code, paragraph five, the defendant requested the court to give the following charge:

> "2. If you find from the evidence that the plaintiff knew that E. E. Galbreath was the president of the defendant bank, and that the loans in question or either of them were for the benefit and personal interest of the said E. E. Galbreath, I charge you that the defendant can not be held liable for any fraud of the said E. E. Galbreath in the making of any loan to himself in which he was personally interested to the knowledge of the plaintiff." (R. 140.)

This request was refused by the court, and exception reserved by the defendant.

Thereupon the court charged the jury that the defendant was plaintiff's agent and that as such it was the

defendant's duty to make the loans, with such care and such good faith as the relationship demanded and that it was the defendant's duty as agent to make known to the plaintiff any matter connected with the making of the loan and the adequacy of the collateral materially affecting the loan and its security.

And further, that if the plaintiff showed by a preponderance of the evidence that the defendant had represented that its stock was worth more than $200.00 a share intending the plaintiff to rely on said representation, that if the plaintiff did rely on said representations which the defendant knew to be false, that the plaintiff was entitled to recover (R. 147-149). And further, that if the representations were in fact false and had been made recklessly and without regard to whether they were in fact false or true, the plaintiff would be entitled to recover (R. 150). The jury thereupon retired and returned the verdict for the plaintiff for $5,899.00. The motions for judgment *non obstante veredicto* and for a new trial were overruled. The case was affirmed by the Court of Appeals on error and the Supreme Court of the State refused to take jurisdiction of the case on the ground that the case was not a case of public or great general interest (R. 197). This decision made the Court of Appeals the last state court of the State of Ohio having jurisdiction. (Constitution of Ohio, Art. 4, Sec. 2; Art. 4, Sec. 6; *City of Akron* v. *Roth*, 88 O. S. 456; *Stratton* v. *Stratton*, 239 U. S. 55). Thereupon the Court of Appeals remanded the record to the Superior Court of Cincinnati for execution, and thereafter on April 26, 1916, the writ of error in the case at bar to the Superior Court of Cincinnati was obtained from Mr. Justice Pitney (R. 221).

There are four federal questions raised by the record, insisted upon throughout by the defendant.

(1) The agreement whereby the defendant undertook to make loans for plaintiff was *ultra vires*, and the law therefore imposed no duty upon defendant, as plaintiff's agent. (Assignments of Error I, II, VII, VIII and XIX).

(2) The National Bank Act gives the public the right to know the condition of national banks (Section 5211, R. S. U. S.). In the case at bar statements giving the public this information were issued. In the issuance of such statements there was a violation of the National Bank Act, in effect willful. The sole remedy provided by the National Bank Act is a forfeiture of the national bank's charter (Section 5239, R. S. U. S.). By virtue of that federal statute, therefore, the defendant could not be made to respond to plaintiff's suit for damages, especially for reckless disregard for truth. For the statute creates the right, and provides the remedy, which is exclusive. (Assignments of Error, III, IV, X, XI, XII, XIX, XX, XXIII and XXIV.)

(3) Are the statements required by Section 5211, R. S. U. S. if false in fact published by the bank with the intention of inducing persons to lend money secured by the stock of the bank publishing the statement? (Assignments of Error, V, VI, XIII, XIV, XV, XXI and XXII.)

(4) Persons dealing with agents of national banks, knowing that said agents have a personal interest in the transaction, do so at their peril and can not recover if the agent's acts were fraudulent. Plaintiff knew of Galbreath's personal interest and therefore can not recover for Galbreath's fraud. (Assignments of Error, XVI, XVII, XVIII and XXV.)

ARGUMENT.

I.

Federal Question Properly Raised.

On January 13, 1914, the defendant filed a general demurrer to the petition setting out therein that the petition does not state facts which show a cause of action because of the provisions of the United States Statutes. This demurrer was overruled on March 9, 1914 (R. 4), exceptions being reserved by defendant.

During the course of the trial (R. 21) counsel for defendant moved that that part of a preceding answer in reference to taking call loans be stricken out because it is not within the power of a national bank to do so. The motion was overruled and exception reserved. At the close of all the testimony counsel for defendant asked that the following charge be given.

> "2. If you find from the evidence that the plaintiff knew that E. E. Galbreath was the president of the defendant bank, and that the loans in question or either of them were for the benefit and personal interest of the said E. E. Galbreath, I charge you that the defendant can not be held liable for any fraud of the said E. E. Galbreath in the making of any loan to himself in which he was personally interested to the knowledge of the plaintiff." (R. 140.)

Motion overruled and exception reserved. Defendant excepted specially to the charge to the jury "because none of the matters mentioned in our special charges were covered or touched upon by the general charge of the court, and further, that by the general charge of the court we are deprived of a title right and privilege or immunity under the laws and statutes of the United States." (R. 152.)

The jury retired and returned a verdict for the plaintiff, and, within the time allowed by law, defendant filed a motion for a new trial, specifically setting out all the federal questions heretofore referred to and assigned as error in the case at bar (R. 14, 16), and, on the same day, filed a motion for a judgment *non obstante veredicto* assigning as reasons for the ground of said motion all the federal questions raised in the assignments of error in the case at bar. These motions were both overruled (R. 17), and exception reserved.

In its petition in error in the Court of Appeals, defendant again specially claimed all the rights under the federal statutes claimed in the case at bar (R. 192). And the Court of Appeals (R. 196) certified that it had considered and decided adversely to the rights as claimed under the federal statutes.

It is not surprising that counsel for plaintiff does not desire to argue this point in view of the many decisions of this court on the subject. As stated in *Chicago, Rock Island & Pacific Railway* v. *Chicago*, 166 U. S. 226, quoted with approval in *Hoyer* v. *Richmond*, 172 U. S. 92, 93, it is sufficient "if it appears from the record that said right was specially set up or claimed in the state court in such manner as to bring it to the attention of that court." In *Hoyer* v. *Richmond*, 172 U. S. 92, federal questions were not raised until the motion for a new trial. They were again raised in the assignments of error in the last state court having jurisdiction over the cause. This was held to give this court jurisdiction so that even without the certificate of the Court of Appeals, this court would have jurisdiction, since it appears plainly throughout the record that the defendant at all times during the trial, and during the pe-

proceedings in the last state court having jurisdiction, claimed that it was not liable because of the very provisions of the federal statutes which it now claims exempts it from liability. The certificate of the Court of Appeals conclusively shows not only that the federal question was raised, but that it was properly raised under the state practice. Therefore this court has jurisdiction of this case. *Merchants National Bank* v. *Wehrman*, 202 U. S. 295. For the sake of brevity we will not refer to the many other cases decided by this court supporting this contention. Therefore, unless the case could have been decided on an independent state ground, there is no color of right to the motion to dismiss.

II.

Federal Questions Necessary for the Decision of the Case in the State Courts.

From the statement of the case it is apparent that liability was imposed notwithstanding the provisions of federal statutes. The immunities claimed were not even in the nature of pleas in confession and avoidance. It was and is our claim that by reason of the provisions of the federal statutes there never was any liability to confess or to avoid; that said statutes exempted us from liability; hence a judgment imposing liability must be adverse to the federal immunities.

A.

The contract was *ultra vires*, and defendant was under no obligation as agent.

The Court of Appeals held, that although the contract between the plaintiff and defendant might be *ultra vires*, that defendant could not plead its want of power in defense to the action. If such a decision is to deprive

this court of jurisdiction, a state court can deprive this court of jurisdiction whenever any federal question is raised by deciding that although the federal question was properly raised and the federal statute might forbid the act, nevertheless, under the state law that this is no defense to the action. It must be apparent that whether the act is, or is not, *ultra vires*, and whether or not *ultra vires* is a defense to the action are both federal questions. It must further be apparent that state courts can not deprive this court of jurisdiction by leaving the question of immunity in doubt and by deciding that the immunity can not be pleaded.

In this case, as in *California National Bank* v. *Kennedy*, 167 U. S. 362,

> "The federal questions which therefore arise on the record may be thus stated: (1) Do the statutes of the United States (Rev. St. Sections 5136, *et seq.*) relating to the organization and powers of national banks prohibit them from purchasing or subscribing to the stock of another corporation? And (2) If a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?"

And as in *California National Bank* v. *Kennedy*, 167 U. S. 362,

> "In view of the fact that the defendant was a national bank deriving its powers from the statutes of the United States, the averment that a particular transaction of the character of the one in question if entered into was without authority of law, can, in reason, be construed only to relate to the law controlling and governing the conduct of the corporation; that is, the law of the United States."
>
> *California Bank* v. *Kennedy*, 167 U. S. 362.

These questions having been thus clearly settled, we will not waste the court's time by reference to the legion of other authorities in point. (We shall point out hereafter that none of the cases cited by plaintiff have any bearing on the merits of the proposition involved in the case at bar.)

B.

Defendant was not liable in damages because the right to learn the condition of national banks from published statements is a right given by the National Bank Act. The statements published were published in such a way as to constitute a violation of the National Bank Act in effect willful, and the National Bank Act, for such violation, gives an exclusive remedy in damages against the directors. The remedy afforded against the bank is a forfeiture of its charter.

In actions against directors it has been held that the directors are responsible only if the statements published were published in such a way as to constitute a violation of the National Bank Act in effect willful. *Yates* v. *Jones National Bank*, 206 U. S. 158. And in *Thomas* v. *Taylor*, 224 U. S. 73, it was held that carrying assets as good assets in published statements after a letter similar to the letter in the case at bar had been received from the Comptroller of the Currency constituted a violation of the National Bank Act in effect willful. It was and is our contention that the provisions of the National Bank Act constitute the sole criterion under which liability of any sort may be imposed upon national banks for any violation of its terms. That when a state court imposes liability in damages upon a national bank in express conflict with the terms of the National Bank Act, that the state court has committed egregious error. It is

true that the plaintiff's suit was against the corporation for damages, partly because of a breach of its alleged duty as agent, but the case was not pleaded or submitted to the jury upon the question of a violation of defendant's duty as the plaintiff's agent. Even if the defendant is liable for violation of its duty as agent, which we deny, the jury was charged to return a verdict against the defendant if it found defendant guilty of a breach of its duty as agent, or if it found us guilty of fraud. Certainly this court ought not speculate as to whether the jury imposed liability upon the defendant on the one theory or on the other if there is no liability on either theory.

Here, as in *Yates* v. *Jones National Bank*, 206 U. S. 158,

> "An immunity was claimed under Section 5239 of the Revised Statutes, at least in respect to the rule of liability applied below, and such immunity was expressly denied by the state court, and there is therefore jurisdiction."
>
> *Yates* v. *Jones National Bank*, 206 U. S. 158, 167.

A fortiori there is jurisdiction when an immunity is claimed in respect to the existence of a liability as well as in respect to the rule of liability applied below.

C.

Statements required by Section 5211, R. S. U. S., are not published with the intention of inducing persons to lend money secured by the stock of the bank publishing the statements. This question is disregarded by counsel for plaintiff in his motion to dismiss. Stated as a syllogism our contention is that the bank's intentions in issuing such statements can only be such as further its activities as a bank under the National Bank Act; that it is not within the sphere of a national bank's activities

to benefit its stockholders by giving them a commodity readily hypothecated as security for a loan (*Merchants National Bank* v. *Armstrong*, 65 Fed. 932), and that therefore a jury can not be permitted to impose liability in deceit upon the bank if the national bank did give one of its stockholders such a commodity. Since this whole question depends upon a proper construction of the National Bank Act it is a federal question and a federal question only, just as the question of a national bank's power is exclusively a federal question.

D.

The plaintiff was bound to inquire as to Galbreath's good faith when he acted for the defendant in transactions in which he was personally interested. For some reason not apparent to us plaintiff does not discuss this as a federal question, although assigned as error (Assignments of Error XXV, R. 219). As president of the Second National Bank, Galbreath's sole power to act was granted to him by the federal statute. Under such authority he could not represent himself and the Second National Bank (*Moores* v. *Citizens National Bank*, 111 U. S. 156), and all persons who knew that he was representing himself knew that he could not also represent the Bank. *Moores* v. *Citizens National Bank*, 111 U. S. 156. That the determination of this question must be resolved by the application of general principles of the common law does not prevent it from being a federal question.

Adams Express v. *Kroninger*, 226 U. S. 91.
Missouri K. & T. R. Co. v. *Harriman*, 227 U. S. 657.
Southern Railway Co. v. *Prescott*, 240 U. S. 632.

The motion to dismiss is thus obviously without color of right.

III.

The Motion to Affirm Should Not Be Entertained.

A.

THE AGREEMENT WAS *ULTRA VIRES* AND IMPOSED NO DUTY ON DEFENDANT.

It is thus apparent that there is no color of right to the motion to dismiss. Therefore, the court should not entertain the motion to affirm. *Whitney* v. *Cook*, 99 U. S. 607; *City of New Orleans* v. *Louisiana*, 129 U. S. 45. We understand counsel to contend, however, that the *ultra vires* question has already been settled adversely to our contention by the decision in *National Bank* v. *Graham*, 100 U. S. 693, and that the motion to dismiss should, for that reason, be entertained. The case of *National Bank* v. *Graham*, 100 U. S. 693, does not apply, in the first place because on page 704 of that case this court holds that the action of the national bank in receiving the special deposits of the bonds lost by the national bank is *intra vires;* in the second place, in that case, in *Logan County Bank* v. *Townsend*, 139 U. S. 62, in *Emmerling* v. *First National Bank*, 87 Fed. 739, and in *Anderson* v. *First National Bank*, 5 N. D. 460, on which counsel rely, the action was in disaffirmance of the contract.

The foundation of plaintiff's claim as stated by plaintiff in the case at bar, is an affirmance of the contract. For the duty to loan money in good faith on collateral would have been non-existent but for the contract. The question of the liability of a national bank as an agent where the action is in affirmance of an *ultra vires* contract is expressly left open for decision in *National Bank & Loan Company* v. *Petrie*, 189 U. S. 423, so that the motion to affirm must be denied unless the *ultra vires* contention is obviously frivolous.

Section 5136 of the Revised Statutes does not give a national bank the power to enter into such a contract as was entered into in the case at bar. Therefore the contract entered into was *ultra vires*. *Logan County Bank* v. *Townsend*, 139 U. S. 69. The rule that national banks have only such powers as are expressly given by the National Bank Act is so well settled that no further authorities will be cited to sustain it. It is also well settled that English banks have not the power to invest or make loans for their customers. Thus in *Bishop* v. *Countess of Jersey*, 2 Drew. 143, the plaintiff brought suit against a private bank to recover from the bank, money which the bank's managing agent had received to invest for its customer, and which had been invested by said managing agent by loan to his son. The loan turned out to be worthless and the suit was brought against the bank on a basis similar to the basis claimed for plaintiff in the case at bar. It was held that there could be no recovery against the bank. Thus at the time of the enactment of the National Bank Act private banks did not have the power to do what the defendant did in the case at bar. The power was not included in Section 5136 and since it was not at that time considered a power incidental to the ordinary business of banking, it would for that reason alone be excluded from the powers granted by Section 5136, even without the rule that a national bank's powers are strictly limited to those contained in said section. The case of *Bobb* v. *Savings Bank*, 23 Ky. Law Rep. 817, involves the powers of a Kentucky state bank. In Bolles on Banks and Banking, 234, and in the second edition of Magee on Banks and Banking, 431, it is pointed out that although state banks have the power to invest their customer's funds, the better view is that national banks have not such power.

This is the express holding of the Supreme Court of Arkansas in *Grow* v. *Cockrill*, 63 Arkansas, 418, 36 L. R. A. 89. The cases of *Central Transp. Co.* v. *The Pullman Co.*, 139 U. S. 62, 78, and of *Hayes* v. *Light & Coal Co.*, 29 O. S. 330, do not involve the question of a national bank's powers. And *Bank* v. *Zent*, 39 O. S. 105, follows this court's ruling in *Bank* v. *Graham*, 100 U. S. 699, to the effect that a national bank has the power to receive special deposits. In *Grow* v. *Cockrill*, 63 Ark. 418, 36 L. R. A. 89, 91, the court says:

> "There is no showing that the bank, by its charter, had authority to transact such business as that of loaning the money of its depositors or other people in general. Such authority we have failed to find in the National Banking Law, and the decisions on the subject, or rather the decisions involving analogous facts, all seem to be to the effect that the business of a broker (and a broker's business is to loan the money of others, or borrow for others, and such like), is not a business in which a national bank can lawfully engage, since it is not mentioned in the National Bank Act and the act is strictly construed as against the grantee corporation, as to the powers conferred as in all cases of private corporate grants of power. In the case, *Weckler* v. *First National Bank of Hagerstown*, 42 Md. 581, a suit was brought against the bank for damages growing out of the purchase of certain bonds which the teller of the bank had sold him, and falsely represented to be what they really were not, to the injury of the plaintiff, the complaint averring that the bank was engaged in buying and selling these bonds, and was therefore liable for damages occasioned by the false representation, in relation thereto of the teller, one of the agents in the transaction of its business. The plaintiff was defeated in his suit, the court holding that the bank had no authority to transact that kind

of business, and the teller was therefor not acting within the scope of his authority and business when he committed the torts complained of. To the same effect is the rule in the case of *First National Bank* v. *Hoch*, 89 Pa. St. 324, and that in the case of *Dresser* v. *Traders National Bank*, 42 N. E. 567."

The cases of *Weckler* v. *First National Bank*, 42 Md. 81; *First National Bank* v. *Hoch*, 89 Pa. 321, and the case of *Grow* v. *Cockrill*, 63 Ark. 418, are all cases like the case at bar in that they were brought in affirmance of the *ultra vires* contract. In all of them it was held that the plea of *ultra vires* was a defense to the association which had entered into the contract. In the *Weckler* case and in the *Hoch* case the bank had acted as a broker in selling securities to a customer instead of acting as broker in selling the customer loans, and, as in the case at bar, induced the customer to purchase the securities by fraudulent representations. In both of the cases it was held that the corporation was not responsible for the fraud because the representations were made beyond the known scope of the bank's authority, or because the whole transaction was *ultra vires*. That is exactly the situation in the case at bar. The plaintiff was bound to know that the act was *ultra vires* and that all representations made to induce an act in the furtherance of the contract were beyond the scope of the bank's powers. And since the contract was *ultra vires*, it imposed no liability on defendant. *National Bank* v. *Wehrman*, 202 U. S. 295. The plaintiff can no more recover than could the plaintiff in the *Weckler* and *Hoch* cases. Not only is plaintiff's contention that this claim is frivolous not ruled by the decisions of this court, but the question has been expressly reserved for decision by this

court, and what authority there is exempts the defendant from liability. With such a state of authorities the contention can not be frivolous.

B.

THE NATIONAL BANK ACT EXEMPTS THE BANK FROM LIABILITY IN DAMAGES FOR A VIOLATION OF ITS TERMS IN EFFECT WILLFUL.

It is not claimed that the second federal question is ruled by the decisions of this court, the only claim being that it forms no basis of the case because the case is one of agency only. If the case had been pleaded or submitted to the jury only on the question of whether defendant had violated its duty as agent or not this might be true. But as pointed out heretofore the amended reply alleged that defendant had made fraudulent misrepresentations, and the jury was instructed to return a verdict in damages against us if it found that the statements were fraudulent, or if it found that the statements were published with reckless disregard of their truth, or if defendant had violated its duty as agent. The question of liability under Sections 5211 and 5239 was thus brought into the case by plaintiff, and kept there by the courts below.

In *Thomas* v. *Taylor*, 224 U. S. 73, this court held that the publication of the statements under circumstances similar to those under which they were published in the case at bar constitutes a violation of the National Bank Act in effect willful. Since the National Bank Act itself provides that there shall be no liability in damages for such a violation of its terms, we can not believe that a claim of exemption from such liability by virtue of the provisions of the act itself will be considered a frivolous

claim in a case in which damages were imposed upon a defendant by a jury under a charge which disregarded the terms of the National Bank Act. Especially in view of this court's holdings that where the National Bank Act creates a right and provides a remedy, that the remedy provided is exclusive. *Barnet* v. *National Bank*, 98 U. S. 558; *Oates* v. *Bank*, 100 U. S. 239; *Stephens* v. *Bank*, 111 U. S. 197; *Hasseltine* v. *Bank*, 183 U. S. 134. It is our contention here and regarding the third federal question raised by the record that the exemption from liability for the damages here imposed was within the express contemplation of the Congress which enacted the National Bank Act. That Congress, mindful of the fact that corporations can only act through individuals, had, by the enactment of Section 5205, R. S. U. S., given national banks the right to rehabilitate themselves upon the impairment of their capital stock. That known human infirmities caused that Congress to place the liability in damages for all violations of the act upon the directors themselves, because the directors themselves, who knowingly violate, or who knowingly permit the bank's officers to violate, the terms of the National Bank Act, must be the human agents of the corporation to commit, and to profit, by any violations of the terms of the National Bank Act. For the directors, and not the association profited particularly by the violation of the National Bank Act in the case at bar. It was the directors, not the association, who owned the stock, and it was the directors, not the association, who wanted to sell their holdings in the association or borrow on the security of its collateral. It made no difference to the association, as an association, whether its stock had a market value of one, or of a million. In either event it could do business But if the stock was advertised as worth $250.00 a

share and the directors were able to sell their stock for $250.00, it meant money in the packets of the directors.

We submit that by making the persons profiting by the violation of the National Bank Act liable in damages, and by reserving to the Comptroller of the Currency the right to forfeit the bank's charter unless it reformed, that Congress showed that it did not intend to make the association which did not profit by the violation, respond in damages. And by reserving to the Comptroller of the Currency the right to punish the association for the action by forfeiture of its charter if the association did not repent and amend its ways, Congress further intended to give the association a *locus penitentiae*. In the case at bar the association has repented and has amended its ways and has elected a new board of directors who did not at any time participate in the wrongs complained of in the case at bar. The Comptroller of the Currency has long had notice of the violations of the National Bank Act in the case at bar and has refused to bring an action for the forfeiture of defendant's charter. Since the National Bank Act gives the Comptroller of Currency the sole remedy against the association which he has declined to press, our contention that others shall not press a remedy which is denied by the National Bank Act can not be frivolous.

C.

STATEMENTS REQUIRED TO BE PUBLISHED BY THE NATIONAL BANK ACT CAN NOT BE MADE THE BASIS OF AN ACTION IN DECEIT.

Our contention here has been decided just once. In that case the decision was favorable to the contention. *Merchants National Bank* v. *Armstrong*, 65 Fed. 932.

We contended in the courts below that the state courts should follow the decision of the federal courts in construing federal statutes. The courts below decided adversely to our contention in this. The decision cited is a decision of the Circuit Court for the Southern District of Ohio, Western Division, and since it can not be an authority in this court the matter is one of first impression. But the reasoning of the decision is so able that we use it instead of our own.

> "It is further urged that the publication is not intended alone for those who are stockholders and depositors at the date of the report, because notice of its contents could be brought home to them in a less public manner, and that the making and publishing of the reports must be for the further purpose of informing those who may contemplate dealings with the bank, or may be brought into connection with it, in any way in which the financial condition of the bank would be a consideration of moment. For illustration, owners of shares of stock, those about to purchase such shares, and third parties having dealings in the stock, entirely independent of and apart from the bank, are referred to. In short, the claim is that the reports were addressed to the general public, and the plaintiff, having acted upon them, was misled to its damage, and entitled to recover. The reports were not made voluntarily, but in compliance with the requirement of the statute. They must be taken to be made only to those within the contemplation and protection of the statute. Experience teaches that the danger of banks, as distinguished from other corporations or agencies for the transaction of business, is not in the fact that their stock may be bought and sold on the market, but in their power to issue notes, receive deposits, and make discounts. The government has always shown a disposition to regulate banks in

order to secure the public against the misuse of these functions. The act is entitled, 'An act to provide a national currency.' It is entirely directed to providing for the safety of the note issue and the security of the discounts and deposits. All its collateral provisions, of which there are a number, including the one under discussion, are directed to that end. The conclusion is irresistible that the statute, in requiring reports such as those in question, contemplates merely the persons who deal directly with the bank as a financial institution; that the report, therefore, is directed to them, and they only can recover. Dealers in the stock of the bank, and holders of it as collateral, are not, under the statute, privy to the reports, and, if deceived or misled by them, they can not recover against the bank. Counsel cite from Cooley, Torts, p. 496, where it is said that 'some representations are made for the express purpose of inducing individuals or the public to act upon them and whoever in fact does receive, rely, and act upon them, in the manner intended, has a right to regard them as made to him, and treat them as frauds upon him, if in fact he was deceived to his damage.' But, in the view just taken, the bank can not be held to have issued the reports for the purpose of inducing transactions such as that set forth in the petition, and the citation, therefore, does not apply."

Merchants Nat. Bank v. [illegible], 43 Ind. [illegible], 936, 937.

It was argued in the course below that the plaintiff was a privy to the reports because of the relation of agency between the plaintiff and defendant. The weight of this contention is not apparent. For the purpose for which the reports were published can not be enlarged by the creation of a relationship not in contemplation by the section of the statute requiring the publication of

the statements. Plaintiff's claim for damages is not that he opened an account with defendant because of the fraudulent misrepresentations, but because he loaned money secured by the stock of the publishing bank relying on the fraudulent misrepresentations. Every cent that the plaintiff had on deposit with the defendant was repaid plaintiff at the time plaintiff closed its account with defendant. Plaintiff's only claim in this regard is for damages because of the alleged fraud which induced plaintiff to lend its money secured by defendant's capital stock.

D.

When Plaintiff Approved the Loans it Knew that Galbreath had a Personal Interest in the Transaction and Therefore Can Not Recover.

Plaintiff knew on December 9, 1911, that E. E. Galbreath, president of the Second National Bank, had caused the Second National Bank to charge $25,000.00 to plaintiff's account for a loan to himself, secured by some of his stock in the defendant, and it had the same knowledge on April 15, 1912, about the loan made on January 9, 1912. If, as plaintiff contends, the defendant was under obligations to it not to make this charge without notifying it of all facts concerning the collateral, defendant's president was under the obligation to defendant to see that defendant fulfilled all its obligations to plaintiff. When defendant's president undertook to borrow this money for himself he had a personal interest in the transaction which conflicted with his duties as defendant's president. Since plaintiff knew of this adverse interest it was not an innocent taker of the loan and took it at its peril. And further, defendant's president did not have authority to act for himself and for the defendant, and of this, too, the plaintiff had notice. *Moore* v. *Bank*,

111 U. S. 156. Therefore plaintiff is not entitled to a recovery.

We respectfully submit that the motion to dismiss should be overruled because the record clearly shows that the very federal questions relied upon in the case at bar were specially set up and relied upon during all the proceedings in the courts below and that the motion to affirm should not be entertained because there is no color of right on the record to the motion to dismiss, and further, because in every instance in which the federal courts have decided any of the questions involved in the case at bar, the decisions are favorable to the contentions here raised.

FERDINAND JELKE, JR.,
LANDON L. FORCHHEIMER,
Attorneys for Plaintiff in Error.

Cincinnati, Ohio, October 16, 1916.

APPENDIX.

"Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

"First: To adopt and use a corporate seal.

"Second: To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

"Third: To make contracts.

"Fourth: To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

"Fifth: To elect and appoint directors, and by its board of directors to appoint a president, vice-president, cashier and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

"Sixth: To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its general business conducted and the privilege granted to it by law exercised and enjoyed.

"Seventh: To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title.

"But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of Currency to commence the business of banking." *Section* 5136, *Revised Statutes of the United States.*

"Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders *pro rata* for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. *And provided*, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto), to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders." *Section* 5205, *Revised Statutes of the United States.*

"Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him,

verified by the oath or affirmation of the president or the cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition." *Section* 5211, *Revised Statues of the United States.*

"On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debt, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comp-

troller of all his acts and proceedings." *Section* 5234, *Revised Statutes of the United States.*

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held." *Section* 5236, *Revised Statutes of the United States.*

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person, shall have sustained in consequence of such violation." *Section* 5239, *Revised Statutes of the United States.*

The only material portions of Article 4, Section 2, and of Article 4, Section 6, of the Constitution of Ohio, are:

Art. 4, Sec. 2. "It (the Supreme Court) shall have original jurisdiction in quo warranto, mandamus, habeas

corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the Courts of Appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law." * * * "In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review, and affirm, modify or reverse the judgment of the Court of Appeals. All cases pending in the Supreme Court at the time of the adoption of this amendment by the people, shall proceed to judgment in the manner provided by existing law. No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court." (As amended September 3, 1912.)

Art. 4, Sec. 6. "The Courts of Appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify or reverse the judgments of the Courts of Common Pleas, Superior Courts and other courts of record within the district as may be provided by law, and judgments of the Courts of Appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the Supreme Court may direct any Court of Appeals to certify its record to that court." (As amended September 3, 1912.)

"Sec. 11329. Excepting averments as to value, or the amount of damage, for the purposes of an action, every material allegation of a petition, not controverted by the answer, and every material allegation of new matter

in an answer not controverted by the reply, shall be taken as true. New matter alleged in a reply shall be deemed controverted by the adverse party as upon a denial or avoidance as the case may require." (General Code of Ohio.)

"Sec. 11447. Sec. 5. When the evidence is concluded, either party may present written instructions to the court on matters of law, and request them to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced." (General Code of Ohio.)

No. 491.

Supreme Court of the United States.

OCTOBER TERM, 1916.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, a banking association organized and existing under the laws of the United States of America,

Plaintiff in Error,

versus

THE FIRST NATIONAL BANK OF OKEANA, OHIO, a banking association organized and existing under the laws of the United States of America,

Defendant in Error.

Motion to Dismiss or to Affirm, and Brief of Defendant in Error on Said Motion.

EDWARD P. MOULINIER,
Counsel for Defendant in Error.

COURT INDEX PRESS, 646-650 Main Street, Cincinnati, Ohio.

Supreme Court of the United States.

October Term, 1916.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, a banking association organized and existing under the laws of the United States of America,

Plaintiff in Error,

No. 491. vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, a banking association organized and existing under the laws of the United States of America,

Defendant in Error.

Motion to Dismiss or to Affirm.

Now comes defendant in error, by its counsel, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction because a Federal question was not properly raised in the court below and no Federal question is involved.

And said defendant in error, by its counsel as aforesaid, also moves the court to affirm the judgment from which said writ of error purports to have been taken,

because, although the record in said cause may show jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only, and that the questions presented by the assignments of error are so frivolous as not to need further argument.

Edward P. Mitchell,
Counsel for Defendant in Error.

Supreme Court of the United States.

October Term, 1932.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, a banking association organized and existing under the laws of the United States of America,

Plaintiff in Error,

No. 68. vs.

THE FIRST NATIONAL BANK OF CINCINNATI, OHIO, a banking association organized and existing under the laws of the United States of America,

Defendant in Error.

Notice of Submission of Motion to Dismiss or to Affirm.

To Messrs. F. Dilks, Jr., and Lawton S. Fordyce, Cincinnati, Ohio,

Counsel for Plaintiff in Error:

Please take notice that on the sixth day of November, 1933, at the opening of the court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court

of the United States for the division of said court thereon. Annexed hereto is a copy of the brief of the argument to be submitted with the said motions in support thereof.

EDWARD P. MOTLEXIER,
Counsel for Defendant in Error.

Received a copy of the above-mentioned motions and brief this 2nd day of October, 1916.

F. JELKE, JR.,
LAURIS L. FURCHGOTT,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

October Term, 1916.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, a banking association organized and existing under the laws of the United States of America,

Plaintiff in Error,

No. 491. vs.

THE FIRST NATIONAL BANK OF OKEANA, OHIO, a banking association organized and existing under the laws of the United States of America,

Defendant in Error.

Brief of Defendant in Error on Motion to Dismiss or Affirm.

STATEMENT OF THE CASE.

The suit was commenced originally in the Superior Court of Cincinnati by The First National Bank of Okeana, Ohio, against The Second National Bank of Cincinnati, Ohio. On March 31st, 1915, a verdict was rendered for plaintiff for $5,869. The case was taken on error to the Court of Appeals of Hamilton County, and

the judgment there affirmed. Thereupon, an application for leave to file a petition in error was made to the Supreme Court of Ohio, which was refused. The present petition in error was taken to the decision of the Court of Appeals, which under the Ohio law is a court of final jurisdiction.

STATEMENT OF THE FACTS.

For the sake of brevity, we shall call the Okeana National Bank plaintiff and the Second National Bank defendant, although in this court the former is defendant in error and the latter plaintiff in error.

The issue made by the pleadings is simple. Plaintiff sued on a contract to perform services on the part of defendant for plaintiff; these services consisted in defendant's acting as agent for plaintiff in loaning money out upon adequate collateral; plaintiff demanded repayment of the money placed in defendant's hands, which payment was refused; an accounting was asked for; defendant answered that the money had been loaned, and the loan approved by plaintiff; plaintiff replied that with knowledge on the part of defendant, it knowingly took worthless collateral for the money of plaintiff, and that by reason of this breach of duty on the part of its agent, of which it was ignorant, plaintiff was entitled to recover the amount of the loans.

The evidence very briefly discloses the following facts:

Early in January, 1911, the cashier of plaintiff arranged with Galbreath, president of defendant, for the opening of an account. Galbreath agreed to pay 2½% on daily balances and, in consideration of getting the account, agreed to make loans for plaintiff.

After this contract was made, defendant loaned for plaintiff various sums of money amounting to $25,000. During the year 1911, defendant Bank loaned on an average for its various customers on collateral the sum of $480,000. This practice had been carried on by defendant bank for ten years prior to the trial.

On December 9th, 1911, defendant loaned $2,500 of plaintiff's money to E. E. Galbreath, president of defendant bank, taking 11 shares of the stock of defendant bank as collateral, and on January 5, 1912, another loan was made to one I. Doyle for $2,500, secured by 12 shares of the stock of defendant bank.

Defendant bank at the time these loans were made was insolvent, and the board of directors and officers of the bank were aware of its condition. On March 4, 1911, T. P. Kane, acting Comptroller of the Currency at Washington, wrote a letter to the bank and directors in which this language occurred (Rec., 174):

> "In view of the foregoing, the condition of your Bank must be regarded as very unsatisfactory. The estimated losses, the questionable assets, and other assets which for one reason or another are subject to criticism, aggregate nearly two million dollars. Many of the objectionable loans are of long standing, and appear to be in worse condition than ever before, and on the whole very little progress has been made in remedying conditions repeatedly criticised by the examiners and this office."

This was nine months before the loan of plaintiff's money.

The reports of the defendant bank, as shown by the *Cincinnati Enquirer*, dates of January 11, 1911, March 10, 1911, June 10, 1911, September 6, 1911, and December

8th, 1911, stated that defendant bank had a capital and surplus of two million dollars and undivided profits of from one hundred to over two hundred thousand dollars. In other words, the bank, although its capital and surplus had been wiped away, still continued to make reports and advertise that it had over two million dollars of assets.

On April 15, 1912, the Clearing House of Cincinnati took over defendant bank, and in July, 1912, an assessment was made on the stockholders for the full amount of their stockholdings. The action of the stockholders in paying assessments prevented the liquidation of the bank by the Comptroller.

The notes aggregating five thousand dollars held by plaintiff were not paid, and as the stock of the Second National Bank held as collateral was worthless, plaintiff bank sustained the loss of the loans.

It will be seen from the above statement that the claim of plaintiff merely was, that defendant bank had assumed to act as its agent to in good faith loan money on collateral; that defendant bank, instead of acting as agent in good faith, loaned money of plaintiff on collateral which defendant knew to be worthless and which plaintiff had every reason to believe was adequate. It was a suit therefore brought in the state courts to hold a national bank on the ordinary principles of agency for a violation of duty as agent.

ARGUMENT.

I.

Federal Question Not Properly Raised.

We do not desire to argue this point, but merely state it. A demurrer was filed in the trial court on January 13, 1914 (Rec., 4), the ground of the demurrer being "that the petition does not state facts which show a cause of action, because of the provisions of the laws of the United States." The printed record does not disclose that this matter was referred to during the reception of evidence, although the original record does contain the contention of defendant that the bank had no power to make loans for customers. At the close of the charge of the court, counsel for defendant excepted to the charge with the statement that, "by the general charge of the court, we are deprived of a title right and privilege or immunity under the laws and statutes of the United States." (Rec., 152.)

In the motion for a new trial before the trial court (Rec., 15), it is set out that the court erred in admitting evidence and ruling on matters of law that deprived defendant of a right and privilege under the following sections of the United States Statutes: Sections 5134, 5136, 5147, 5155, 5190, 5211 and 4239. The same claims were made in the petition in error (Rec., 192), filed in the Court of Appeals of Hamilton County, and the certificate of the Court of Appeals (Rec., 196), recites that federal questions were raised.

II.

Federal Question Not Necessary for Decision of the Case in the State Courts.

In the Ohio courts only two federal questions were argued. The first was that no power was granted under the National Banking act for a National Bank to act as agent to loan money for a depositor; and that therefore such acts were *ultra vires*. The second was that the only remedy plaintiff had was a suit against the directors to enforce their personal responsibility under Section 5239, R. S. U. S. We will take up these points in their order.

No. 1.

Ultra Vires.

Section 5136 relates to the corporate powers of banking associations. No. 7 of the enumeration of powers reads: "To exercise all such incidental powers as shall be necessary to carry on the business of banking." It is claimed by opposing counsel that a national bank can not act as agent for another bank to loan money because such power is not specifically given in Section 5136, and is not to be implied under subdivision No. 7 just quoted. The state court of appeals in its opinion (Rec., 200) on this point say:

> "Counsel for plaintiff in error contend that the conduct of the Cincinnati Bank was *ultra vires* and that, for this reason, it is not liable in this action. Even if we should assume that the transaction was beyond the authority of a national bank, it would not follow that plaintiff

would be thereby debarred from a recovery, and the contention can not be sustained."

The court holds that even if it be conceded that the transaction was *ultra vires*, defendant bank would not be relieved of its liability for the reason that having acted as agent, it would be liable under ordinary principles of law for bad faith in its acts as agent. This principle was clearly established in *National Bank* v. *Graham*, 100 U. S., 699. In this case, a national bank assumed to act as a depositary for the safekeeping of bonds. The bonds were lost and the owner brought suit against the bank for the value of the bonds. The bank defended on the ground that it could not act as a depositary and, therefore should not be held liable. The court say of this contention, bottom of page 701:

> "Conceding for the moment that the contract was illegal and void for the reason alleged in behalf of the bank, the consequence insisted upon would by no means follow."

Also further along on page 702:

> "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application."

To the same effect are the following cases:

Anderson v. *The First National Bank of Grand Forks*, 5 N. D., 451.
Bank v. *Zent*, 39 O. S., 105.
Hayes v. *Light & Coal Co.*, 29 O. S., 330.
Bobb v. *Savings Bank*, 23 Ky. L. Rep., 817.
Emmerling v. *First National Bank*, 97 Fed., 739.
Central Transp. Co. v. *The Pullman Co.*, 139 U. S., 24-60.

Logan County Bank v. *Townsend*, 139 U. S., 62-78.
Thompson v. *Bank*, 146 U. S., 240-251.

It appears clearly from these cases that even if we concede that the conduct of defendant bank in acting as agent was *ultra vires*, which question was not necessary to be decided, the bank would still be liable upon ordinary principles of the law relating to corporations and agency. So far then as the defense of *ultra vires* is concerned, that question was not necessary for a decision, and the Ohio court expressly so held.

No. 2.

The Other Alleged Federal Question Involved Section 5239.

This section is as follows:

> "If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person, shall have sustained in consequence of such violation."

The argument of counsel for the bank was, that the only liability on the part of the bank or any one connected with it was a suit against the directors personally or a suit brought by the Comptroller of the Currency for a dissolution of the banking association. The reasoning on this point was, that since the statutes gave a remedy, this remedy was exclusive and no other form of suit could be brought.

There is in this contention of counsel a wholly unwarranted position. We very readily concede that, if the suit had been against the directors, it would have been under this section and we should have been compelled to prove a knowing violation of the statute in order to hold the directors personally responsible.

Yates v. *Jones National Bank*, 206 U. S., 158.
Thomas v. *Taylor*, 224 U. S., 73.

Our suit, however, was not brought under the statutes of the United States. We did not sue the directors at all. Our suit was against the corporation, The Second National Bank, for damages for a violation of its duty owing to us as our agent. The claim of counsel that this section of the United States Statutes has any application is not even remotely meritorious. Our suit in no way involves this section, and we can not see how the fanciful resort to the claim in this court entitles counsel for defendant to the right to say that a federal statute is involved. There is a vast difference between the liability of a corporation and the personal liability of directors. The corporation is liable for the acts of its officers within the real or apparent scope of their authority. The directors are only liable for wrongful acts in which they knowingly participate. The latter liability is alone involved in Section 5239.

The Court of Appeals (Rec., 200) say on this point:

> "We are in accord with the contention in the brief of counsel for the Okeana bank that this is not an action under the national banking act against the directors, nor is it a suit, in the strict sense of the term, for deceit, but it is an action against the Cincinnati bank for a violation of the duty which it owed as an agent to its principal."

There are no authorities bearing on the question, probably for the reason that no one before ever considered seriously that a suit against a bank for violation of duty as an agent had anything to do with Section 5239, R. S. U. S., which only involves the personal liability of directors. We, submit therefore, that no federal question was either necessary for the determination of the case in the state courts, nor was such a question decided by said courts. Opposing counsel with equal merit might have claimed that the judgment was rendered without due process of law and therefore was in violation of the Constitution of the United States. The mere assertion of a federal question, unless fairly involved, does not warrant a resort to this court.

As said by Mr. Justice Peckham in *Wilson* v. *North Carolina*, 169 U. S., 586, citing from page 595:

> "In *Hamlin* v. *Western Land Company*, 147 U. S., 531, it was stated that 'a real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts.' *Millingre* v. *Hartupee*, 6 Wall., 258; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S., 79, 87. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at

> least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay." "

It is not necessary to refer to the many decisions of the Supreme Court on the point as to necessity of federal question being decided by state court, and we contest ourselves with citing *California Powder Works v. Davis*, 151 U. S., 393, in which the court say:

> "It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented."

See, also,

Barrow v. Texas, 163 U. S., [illegible]
Brooper v. Negro, 139 U. S., 307-311.

We respectfully submit that the motion to dismiss be granted.

[signature]

Attorneys for Defendant in Error.

Cincinnati, Ohio, September 30, 1916.